82-517

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ALEXANDER L. STEVAS,
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No. _____

In the Supreme Court
OF THE
United States

October Term, 1981

VOLVO PENTA OF AMERICA
Petitioner

vs.

PATRICK H. KENNEDY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Questions Presented.

1. Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment, Volvo of America, was properly served with process by respondent serving, at four o'clock in the afternoon on the eve of July 4th, a summons and complaint upon a production line worker, who at no time had been authorized to represent, with regard to corporate matters, or to accept service of process on behalf of, Volvo of America or its Volvo Penta division, and whose work was limited to shipping, stocking and production line activities of a production and assembly plant, containing no corporate offices of either Volvo of America or its Volvo Penta division?

2. Whether the Supreme Court of the State of Washington, acted consistently with the Due Process Clause of the Fourteenth Amendment, in reviewing the Court of Appeal's reversal of the trial court's denial of petitioner's motion to vacate a default judgment entered in favor of respondent?

3. Whether the decision of the Supreme Court of the State of Washington, in determining that Mr. Machupa had been given express authority from Volvo of America to accept the summons and complaint, was so totally devoid of evidentiary support as to render the reinstatement of the default judgment unconstitutional under the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provision	3
Statement of the Case	3
Reasons for Granting Review . . .	14
I.	
A Judgment Entered Without Personal Jurisdiction Over the Defendant is Void. On Motion to Vacate a Default Judgment for Lack of Personal Jurisdiction, the Courts of the State of Washington are Misapplying the Principles of Personal Jurisdiction and Due Process of Law	14
II.	
Defendants Will Continue, as in This Case, to be Deprived of Due Process of Law Unless There is a Uniform Application of the Procedural Rules in Cases Involving Motions to Vacate Where a Judgment is Void	17

Page

III.

A Decision Which is Totally Devoid of Evidentiary Support Renders a Judgment Based on That Decision Unconstitutional Under the Due Process Clause 20

Conclusion 22

INDEX TO APPENDICES

Appendix A. Opinion. . . App. p. 1

Justice Utter, dissenting . . . 12

Appendix B. Opinion. 19

TABLE OF AUTHORITIES CITED

Cases

Garner v. Louisiana, 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961) 20

International Shoe v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945) 15

Kennedy v. Sundown Speed Marine, Inc., 97 Wn.2d 544, 647 P.2d 30 (1982) 2

Page

King County v. Rae, 21 Wn.2d 593, 152 P.2d 310 (1944) 18

Metropolitan Fed. Sav. & Loan Ass'n v. Greenacres Memorial Ass'n, 7 Wn. App. 695, 502 P.2d 476 (1972) 18

Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 41 L.Ed.2d 72, 94 S.Ct. 2328 (1974) 20

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877) 15

Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960) 21

Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980) 15,17

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1950) 20

Veeck v. Commodity Enterprises, Inc., 487 F.2d 423, 426 (9th Cir. 1973) 15

Constitutions

United States Constitution, Fourteenth Amendment i,ii,3, 19,20

Page

Rules

Federal Rules of Civil Procedure, Rule 60(b) 18,19

Federal Rules of Civil Procedure, Rule 60(b)(4) 18,19

Washington Superior Court Civil Rule 60(b) 18

Washington Superior Court Civil Rule 60(b)(1) 9

Washington Superior Court Civil Rule 60(b)(5) 9,11, 17,18

Statutes

Revised Code of Washington, Title 4, Section 28.080(10) 12

United States Code, Title 28, Section 1257(3) 3

Treatises

11 C. Wright & A. Miller, Federal Practice, § 2862 . . . 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. _____

VOLVO PENTA OF AMERICA, Petitioner,

v.

PATRICK H. KENNEDY, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

Petitioner Volvo Penta of America respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 24, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reproduced as Appendix "A" hereto. It was reported in

the Washington Reports with the following citation, Kennedy v. Sundown Speed Marine, Inc., 97 Wn.2d 544, 647 P.2d 30 (1982). The opinion of the Court of Appeals of the State of Washington is reproduced as Appendix "B" hereto. It was an unpublished opinion noted at 29 Wn. App. 1027 (1982).

JURISDICTION

The judgment of the Supreme Court of the State of Washington reinstating the default judgment of the Superior Court for Benton County was filed on June 24, 1982. On July 21, 1982, the Clerk of the Supreme Court of the State of Washington certified that on July 14, 1982, the court's opinion became the decision terminating its review of the case, and the cause was then mandated to the Superior Court for Benton County. This

petition for certiorari was filed within 90 days of the filing of the opinion by the Supreme Court for the State of Washington. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution (in relevant part):

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Volvo of America Corporation, improperly sued herein as Volvo Penta of America,[1] seeks to reverse the decision

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[1] Volvo Penta is a division of Volvo of America Corporation, which has no subsidiaries, but which is a wholly owned subsidiary of Volvo North America Corporation, which has two other wholly owned subsidiaries, Volvo Canada Limited and Volvo White Truck Corporation.

of the Supreme Court of the State of Washington which reinstated the default judgment of the Superior Court for Benton County entered in favor of Patrick H. Kennedy in the amount of twenty-eight thousand seven hundred and twenty-five dollars ($28,725.00), together with interest at the rate of 12% per annum. (CP 55)[2]

Volvo Penta of America, hereinafter referred to as "Volvo Penta," is a division of Volvo of America, hereinafter referred to as "Volvo," which is incorporated in the State of New Jersey, with its principal place of business in Rockleigh, New Jersey. Volvo also maintains a production plant for the assembly of

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[2]CP refers to Clerk's Papers prepared for the appeal to the Court of Appeals.

boat engines in Chesapeake, Virginia. However, there are no corporate offices which conduct business on behalf of Volvo located at the Chesapeake plant, nor are any officers of Volvo Penta employed at the plant. (CP 47-48)

Respondent Patrick H. Kennedy brought an action against Sundown Speed Marine, Inc., doing business as Sundown Marine; Hawaiian Boats, Inc.; and Volvo Penta of America, alleging that he had on September 16, 1978, purchased a 28-foot "speed boat" from Sundown Speed Marine, Inc., in Pasco, Washington, manufactured by Hawaiian Boats, Inc., and equipped with a Volvo Penta engine. Mr. Kennedy further alleged to have revoked his acceptance of the boat and rescinded his contract of purchase, claiming all named defendants were jointly guilty (sic) of

misrepresentation, negligence and fraud. (SP 20-21)[3]

On July 3, 1979, at 4:00 p.m., the Sheriff of Chesapeake County, Virginia, served Mr. Kennedy's summons and complaint upon Mr. Michael Machupa. Mr. Machupa was and is a materials supervisor employed on the production line at the Chesapeake assembly plant, without express authority to represent Volvo Penta or Volvo, and he has never represented Volvo Penta or Volvo in any action or proceeding. As established by Mr. Machupa's affidavit, his duties are strictly mechanical in nature, being confined to production line activities.

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[3]SP refers to Respondent's Supplement to Clerk's Papers prepared for the appeal to the Court of Appeals.

As further established in Mr. Machupa's affidavit, he did not realize the significance of the legal papers with which he had been served, but felt it appropriate they be "shipped" to Volvo's corporate headquarters. He therefore gave the papers to Joan Richards, a clerical employee, who claims to have mailed the summons and complaint to Volvo's corporate headquarters on July 4, 1979. Neither employee did anything further to insure the papers were received or responded to by Volvo after July 4, 1979. (CP 34-35, 47-48)

As shown by the affidavit of Paul E. Dixon, Assistant General Counsel for Volvo, the summons and complaint were never received by Volvo, and no authorized representative of Volvo or employee at its corporate headquarters was made

aware of the purported service of process or of the pendency of the action. (CP 47-48)

On September 6, 1979, the Benton County Superior Court entered its Findings of Fact and Conclusions of Law. The court found that Mr. Kennedy had advanced the sum of fifteen thousand eight hundred dollars ($15,800.00) for the purchase of his speed boat; the court further found that it was possessed of jurisdiction to enter a judgment against Volvo Penta in the sum of twenty-eight thousand seven hundred and twenty-five dollars ($28,725.00), together with the interest at the rate of 12% per annum. A judgment in this amount was entered on September 6, 1979. (CP 56-58, 55)

Following entry of this default judgment, Mr. Kennedy's counsel forwarded a

copy of said judgment to Volvo Penta with a demand for payment. This was the first time either Volvo Penta or Volvo became aware of the litigation. (CP 47-48) Thereafter, counsel was retained to represent Volvo.

On October 17, 1979, Volvo submitted a motion to vacate the default judgment pursuant to Superior Court Civil Rules 60(b)(1) and 60(b)(5) of the Washington Court Rules. At this same time, Volvo submitted a motion and order to show cause supported by counsel's affidavit, requiring Mr. Kennedy to appear and show cause why the default judgment should not be vacated based upon failure to obtain jurisdiction over Volvo and upon mistake, inadvertence or excusable neglect on Volvo's part. (CP 49-53, 54-55)

On November 17, 1979, Volvo's motion to vacate the default judgment was heard before the Honorable Albert J. Yencopal in the Superior Court of Benton County. At the time of the hearing counsel for Mr. Kennedy produced, for the first time, an affidavit which he had signed and which had attached to it a letter, addressed to counsel for Mr. Kennedy from Deputy Sheriff James W. Dunlo, who served the summons and complaint on Mr. Machupa. Deputy Sheriff Dunlo claimed in the letter that Mr. Machupa had received authority from the "Volvo Plant in New Jersey" to "accept the papers being served" after placing a long-distance phone call.[4] (CP 5, Verbatim Report of Proceedings, 5-15)

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[4]The letter is reproduced in the opinion of the Supreme Court of the State of Washington which is Appendix "A" hereto.

Counsel for Volvo objected to the letter as being inadmissible evidence. The trial court then proceeded to deny the motion to vacate the default judgment without requiring any foundation to be laid concerning the letter from Deputy Sheriff Dunlo and despite the fact that the affidavit from Volvo's assistant general counsel was contrary to the letter from Deputy Sheriff Dunlo. (Verbatim Report of Proceedings, 5-15)

Volvo appealed the denial of its motion to vacate to the Court of Appeals of the State of Washington. In an unpublished opinion, the Court of Appeals on June 18, 1982, unanimously reversed the default judgment. (See Appendix "B")

The Court of Appeals based its decision on Superior Court Civil Rule 60(b)

(5) which allows vacation of a void judgment. It determined that the service of process on Volvo was violative of RCW 4.28.080(10), which deals with service of process upon foreign corporations doing business within the State of Washington. This statute provides in pertinent part:

> The summons shall be served by delivering a copy thereof, as follows:
>
> . . .
>
> (10) If suit be against a foreign corporation . . . to any agent, cashier or secretary thereof.

Because Mr. Machupa lacked the requisite authority to be served with process for Volvo, the service was not valid. Therefore, the trial court had no jurisdiction over Volvo, and as a result, the default judgment was void. (Appendix "B")

Mr. Kennedy then sought review by the Supreme Court of the State of Washington,

which on June 24, 1982, reversed the Court of Appeals and reinstated the default judgment, holding that the trial court had not abused its discretion in refusing to vacate the judgment. The court referred to the letter from Deputy Sheriff Dunlo and noted that the trial court could have concluded that Mr. Machupa had been given authorization by Volvo to receive service. (Appendix "A")

REASONS FOR GRANTING REVIEW

I.

A JUDGMENT ENTERED WITHOUT PERSONAL JURISDICTION OVER THE DEFENDANT IS VOID. ON MOTION TO VACATE A DEFAULT JUDGMENT FOR LACK OF PERSONAL JURISDICTION, THE COURTS OF THE STATE OF WASHINGTON ARE MISAPPLYING THE PRINCIPLES OF PERSONAL JURISDICTION AND DUE PROCESS OF LAW.

The term "due process of law" as it is applied to a judicial proceeding means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent to pass upon the subject matter of the suit; and, if that involves a determination of the personal

liability of a defendant, he must be brought within the jurisdiction of that tribunal. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed 565 (1877).

Modern jurisprudence regarding the power of a state to exercise personal jurisdiction over persons not found within the state dates back to International Shoe v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154 (1945).

The Superior Court's lack of personal jurisdiction over a defendant renders void its default judgment against that defendant. Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980); Veeck v. Commodity Enterprises, Inc., 487 F.2d 423, 426 (9th Cir. 1973).[5]

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[5]As determined by the Court of Appeals, personal service upon Volvo was inade-

Notwithstanding the foregoing principles of law, the Supreme Court of the State of Washington, as shown by its decision in this case, allows a judgment to be entered against a defendant, despite its lack of personal jurisdiction over that defendant. This is contrary to law because it requires less than the process which is due under our system of jurisprudence. Accordingly, this Court should grant certiorari to assure the protection and enforcement of individual rights.

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quate because Mr. Machupa, upon whom service was rendered, was not shown to be an "agent" of Volvo. Therefore, the Superior Court lacked jurisdiction over Volvo.

II.

DEFENDANTS WILL CONTINUE, AS IN THIS CASE, TO BE DEPRIVED OF DUE PROCESS OF LAW UNLESS THERE IS A UNIFORM APPLICATION OF THE PROCEDURAL RULES IN CASES INVOLVING MOTIONS TO VACATE WHERE A JUDGMENT IS VOID.

A reviewing court has a "nondiscretionary duty" to grant relief from a default judgment in cases where there has been a proper request, pursuant to Superior Court Civil Rule 60(b)(5) of the Washington Court Rules, to be relieved of a default judgment on the ground that the judgment was void for lack of personal jurisdiction. Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, supra, 614 F.2d 1247,

1256.[6]

A motion under Superior Court Civil Rule 60(b)(5) is treated differently than motions under other subsections of Rule 60(b).[7] As pointed out by the commentators on the Federal Rules of Civil Procedures,

> Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the

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[6]Washington courts have implicitly recognized a "nondiscretionary duty" to grant relief from a default judgment based on lack of personal jurisdiction. King County v. Rea, 21 Wn.2d 593, 152 P.2d 310 (1944) (vacating lower court decree without referring to abuse of discretion); Metropolitan Fed. Sav. & Loan Ass'n v. Greenacres Memorial Ass'n, 7 Wn. App. 695, 502 P.2d 476 (1972) (the distinction between void and voidable judgments was recognized).

[7]CR 60(b)(5) is identical to its federal counterpart FRCP 60(b)(4) and provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from

> court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

11 C. Wright & A. Miller, Federal Practice § 2862, at 197 (1973).

There is no justification for the denial by the Washington State courts of petitioner's right to due process. This Court should, therefore, grant certiorari to assure that the Washington State courts act consistently with the requirements of the Due Process Clause.

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a final judgment, order or proceeding for the following reasons: . . . (5) The judgment is void."

III.

A DECISION WHICH IS TOTALLY DEVOID OF EVIDENTIARY SUPPORT RENDERS A JUDGMENT BASED ON THAT DECISION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied. Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 310, 41 L.Ed.2d 72, 94 S.Ct. 2328 (1974); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491, 95 L.Ed. 456, 71 S.Ct. 456 (1950).

This Court has granted certiorari to review matters of evidence in cases where the decision below appears to be shockingly wrong and, thus, presents substantial due process questions. Garner v. Louisiana, 368 U.S. 157, 7

L.Ed.2d 207, 82 S.Ct. 248 (1961); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960).[8]

Use of inadmissible evidence to support reinstatement of a default judgment deprives litigants of their right to due process. Review by writ should be granted.

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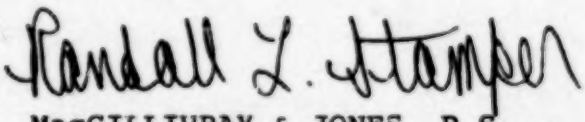
[8]The only evidence which could support a finding of representative capacity on the part of Mr. Machupa was the unverified letter from Deputy Sheriff Dunlo, which was objected to as inadmissible when it was presented to the court. Because the letter was inadmissible and because the affidavits of Mr. Dixon and Mr. Machupa establish that Mr. Machupa did not have authority to accept service of process, the decision of the Supreme Court of the State of Washington was totally unsupported by evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,



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